

The Rationale of Punitive Damages

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INTRODUCTION

Superficially, the boundaries marking off the civil section of the law from the criminal division, seem to be clearly defined, the one readily distinguishable from the other. In point of fact, however, there is in many instances an overlapping and dovetailing, a blending of the categories, so to say. This gives rise to the necessity for subjecting to careful scrutiny the framework of actions that partake of both a criminal and a civil nature.

Now the objective in the civil forum is basically to make the aggrieved party whole. In the criminal court, the goals may be variously stated, though *en rapport*: first, to punish the offender against society;¹ secondly, to deter him and other from perpetrating similar, or any, offenses against society; and thirdly, to inspire in the offender an approach to penitence for his wrongful act.² Yet an examination discloses that, to a not inconsiderable extent, the civil tribunal acts as a supplementing, bolstering factor, to secure the objectives of the criminal forum.

The subject of punitive damages, indiscriminately referred to in the reported cases as exemplary, punitory, vindictive or imaginary damages, or smart money,³ furnishes a choice ex-

¹ It is the interest of society which is stressed in a criminal action; and the state in its sovereign capacity is always plaintiff.

² The etymological aspects of incarceration in a "penitentiary" are obvious.

³ See *Fay vs. Parker*, 53 N. H. 342, 16 Am. Rep. 270 (1870), opinion per Foster, J. This classic case is illuminating on the entire subject, and can be studied with profit. The authorities are extensively reviewed and weighed. At p. 286, the court says:

" . . . it is interesting as well as instructive to observe that one hundred and twenty years ago (that is, *circa* 1753) the term *smart money* was employed in a manner entirely different from the modern signification which it has obtained, being then used as indicating compensation for the smarts of the injured person, and not, as now, money required by way of punishment, and to make the wrong-doer smart (citing from Rutherford's translation of Grotius.)."

It should be said that the various expressions embracing the concept of "punitive" damages are used in this paper interchangeably (*Fay vs. Parker, supra*, at p. 271).

ample. If one asks what is the rationale underlying the award of such damages in cases of malicious prosecution, false imprisonment, slander, libel, assault and battery, and the like, the very designation "punitive" furnishes a material clue. And if we are forced to conclude that the objective is truly to *punish* the offender by the assessment of damages over and above that which will make the complainant whole, is not the offender, in effect, being fined in a civil action?

THEORIES SUPPORTING AN AWARD OF PUNITIVE DAMAGES

In the early English cases wherein the doctrine had its genesis, the courts took the position that, the litigants having made an issue to the country, they had left solely within the province of the jury to determine whether or not the plaintiff ought to recover, and if so, in what amount. Having done this, the courts reasoned, the defendant could not with propriety question the award. Thus, at that time, the courts did not deem it necessary to give extensive consideration to the premise, because of this convenient rule: that the courts would not disturb a jury verdict on an award of damages.⁴

Today this is not the case, of course, and we naturally find that other bases must obtain for permitting an award of punitive damages.

Various theories have been expounded for allowing such an award. One concerns itself with the broad aspects of public policy. The courts adhering to this proposition will point out that the jury may assess exemplary damages (in a proper case, to be sure), to punish the offender, and to deter him and others from perpetrating acts similar to those forming the gravamen of the action.

Thus, in an early Ohio case, the court, placing emphasis on the matter of punishment, says, in the course of its opinion:

⁴ *Huckle vs. Money*, 2 Wils. K.B. 205, 95 Eng. Rep. R. 768, (1763); *Russel vs. Palmer*, 2 Wils. K.B. 325, 95 Eng. Rep. R. 837 (1767). And see generally, *Sedgwick on Damages* (1912—9th Ed.) Vol. I, pp. 687-689.

Cf. *Roy vs. Duke of Beaufort*, 2 Atk. 191, 26 Eng. Rep. R. 519, 520 (1741), where the court says:

" . . . nor was there any notice taken of killing the Duke's dog, and, however trifling it may be called, if such a thing came before me at nisi prius, on the insolent behaviour of the person at the time he shot the dog, and other circumstance, I should have made no scruple of directing very considerable damages."

It is interesting to note that dogs were not the subject of larceny at the common law. *Ohio vs. Lymus*, 26 Ohio St. 400, 402 (1875).

The principle of permitting damages in certain cases, to go beyond naked compensation, is for example, and the punishment of the guilty party for the wicked, corrupt and malignant motive and design, which prompted him to do the wrongful act.⁵

The advocates of this tenet must be prepared to follow its implications to their logical conclusion: that in instances where the allotment of punitive damages is a proper issue, the civil branch of the law acts to secure, more or less, the objectives of the criminal tribunal.

Another theory upon which has been predicated the feasibility of allowing vindictive damages in certain cases is that of additional compensation to the injured party. So, it has been observed that the idea of punishment is not the goal in such cases, but rather an increased assessment of damages because of the supposed aggravation of the injury to the sensibilities of the complainant, by virtue of the wanton or reckless acts of the offender.⁶

Sometimes an attempt is made to blend the two theories, and as illustrative of the confusion resulting when this is done, the statement of the court in *Sess vs. Marinari* is peculiarly apropos:

Punitive damages should not be awarded in any case where the amount of compensatory damages is adequate to punish the defendant, but only where they are insufficient for that purpose.⁷

Still another hypothesis has its roots in the observation that there is a certain middle ground embracing cases which have criminal aspects, but for which there is no appropriate punitive device in the criminal forum. Hence the civil agency must assume this task, it being to the public interest that the complainant be sued civilly. With this pragmatic theory, if it may be so designated, as its bulwark, the court, in *Hopkins vs. R.R.*, by Perley, C.J., observes that the recovery of exemplary damages in certain specific types of cases "is perhaps in accordance with the legislative policy which has given pecuniary penalties

⁵ *Simpson vs. McCaffrey*, 13 Ohio. 508, at 522 (1844). And see *Western Union Telegraph Co. vs. Smith*, 64 Ohio St. 106, at 116, 59 N.E. 890 (1901).

⁶ *Brause vs. Brause*, 190 Ia. 329, 177 N.W. 65, at 70 (1920), in which case the exposition of this theory appears. And cf. *Wise vs. Daniel*, 221 Mich. 229, 190 N.W. 746 (1922).

⁷ 94 S.E. 968, 81 W. Va. 500 (1918).

in numerous instances to private prosecutors of certain offenses."⁸

While it is undoubtedly true that in certain classifications offenses relating to gaming being a ready-to-hand example,⁹ the legislature has seen fit to reward the prosecuting witness, it is submitted that this can hardly be treated as a credible basis for permitting an award of punitive damages. Especially is this so when it is borne in mind that the early development of the rule had no connection with such acts of legislative bodies. In fact, the reverse may well be true; namely, that such legislative enactments had their inception in the judicial attitude already formulated and crystallized.

In any event, this theory is certainly not all-inclusive, and cannot possibly relate to those cases where the offender may face an assessment of punitive damages, even though he must answer in the criminal forum as to the same fact configuration. This situation is of relatively frequent occurrence, and in the many jurisdictions where the act of the offender may make for both a civil and a criminal action, it must be obvious that the civil agency becomes the forum for the affixing of penalties more in keeping with the functions of the criminal court, regardless of what theory is employed to justify the recovery.

On occasion it is intimated that, even if there is no prop to support the rule, it having been clothed with the sanctity of the ages, it should be applied, and its operation perforce can not be open to question.¹⁰

⁸ 36 N. H. 9 (1857). The court continues:

"Where the wrong done to the party partakes of a criminal character, though not punishable as an offence against the State, the public may be said to have an interest that the wrong doer should be prosecuted and brought to justice in a civil suit; and exemplary damages may in such cases encourage prosecutions where a mere compensation for the private injury would not repay the trouble and expense of the proceeding."

The case is approved, and the above excerpt quoted by the court in *Rwy. vs. Dunn*, 19 Ohio St. 162, at 172 (1869). In *Fay vs. Parker*, a later New Hampshire decision, note 4, *supra*, the opinion is carefully analyzed by Foster, J., and its limits defined. The *Parker* case, decided after the *Hopkins* case, repudiated the doctrine of punitive damages.

⁹ See Ohio Gen. Code (Throck. 1934) secs. 5969, 5970; *Cooper vs. Rowley*, 29 Ohio St. 547 (1876).

¹⁰ *Day vs. Woodworth*, 13 How. 363, 371, 14 L. Ed. 181 (1851). The opinion is commented upon by Sedgwick, note 3, *supra*, at p. 697, and at p. 700, the writer of this valuable treatise says:

"Upon the whole, the doctrine is to be supported (except in those few jurisdictions which have repudiated it) mainly upon the grounds of authority and convenience."

See, also, *Daugherty vs. Shoun*, 48 Tenn. (1 Heisk.) 302 (1870).

It is suggested by the writer that, possibly allied to some of the other theories propounded by the courts, there was another basis for permitting such an award, though not alluded to in the reported cases. In this connection, let us tabulate the various felonies differentiated from each other at an early day. Fundamentally, there were seven: murder, manslaughter, rape, arson, burglary, larceny and robbery. Whether or not these offenses related to the person, to property, or to both, in the event of a verdict of guilty being returned by the jury, capital punishment was the portion of the offender. But even for comparatively minor offenses against property, the punishment, judged by modern standards at least, was unusually severe.¹¹ This did not obtain as regarded minor offenses against the person. So, to rationalize a recovery by way of punitive damages, the judges passing on the question may well have been influenced by the consideration that the punishment in the criminal forum in relation to minor offenses against the person was not severe enough, when compared to the punishment meted out for minor offenses against property, although attending major offenses, whether against the person or property, there was dealt out the same degree of punishment. Accordingly, it would follow that the civil forum should be invoked, in proper cases, to act as a punitive agency, and fitly enough, to make a better balance. In other words, here would be the desideratum for effecting a practical synthesis of the civil and criminal agencies, though their functions be admittedly differentiated as to method and objective, in the first instance.

Such a suggestion appears to be plausible, when it is noted that, in the main, it is offenses against the person which are proper subject-matter for the allowance of punitive damages.

OBJECTIONS TO THE DOCTRINE

Of more than academic significance is the problem in its entirety, when it becomes apparent that, in civil cases where the allotment of exemplary damages is an issue, elements are present which may be more properly referable to the criminal

¹¹ In connection with this observation, see *Rex. vs. Jones*, 4 Car. & P. 217, 172 Eng. Rep. R. 677 (1830). Sometimes, technical considerations as to property offenses were invoked in favor of the accused, presumably because of the severe punishment entailed. See *Rex vs. Birdseye*, 4 Car. & P. 386, 172 Eng. Rep. R. 751 (1830); *Rex vs. Birket*, 4 Car. & P. 216, 172 Eng. Rep. R. 676 (1830). The three cases, collectively weighed, afford a stimulating study.

forum. Assume, for example, that the civil suit is being tried in a jurisdiction, such as Ohio, where three-fourths of the jurors may concur in returning a verdict.¹² In a criminal proceeding, all the jurors must agree;¹³ yet, in the civil forum, in such cases, a jury of less than twelve may act to inflict a penalty, by way of punishment (if the "punishment" theory be regarded as tenable).

Other objections have been urged. One is that, from the evidentiary standpoint, the defendant, charged with crime, must be proved guilty beyond a reasonable doubt; in a civil case, a preponderance of the evidence suffices.

Another is that, in a civil suit, the defendant may be compelled to testify against himself, whereas in a criminal action, his testimony must be offered voluntarily.¹⁴ And more objections along these lines will suggest themselves.

From these, the consequence is unavoidable that, in many instances, to secure an objective identical in theory, and sometimes in practical effect, with that of the criminal agency, instrumentalities are utilized that do not secure to the defendant the safeguards which encloak him in the criminal tribunal. Accordingly, in these cases, he stands in the civil forum stripped of the protective aegis which is his for the asking in the criminal court.

Mention should also be made of another disturbing factor; namely, that the jurors have no guide or norm in assessing damages which transcend such as will make the aggrieved party whole. Where the question is one of compensation, appropriate measuring-sticks are available. But in cases where the allotment of vindictive damages is an issue, these gauges are absent, and if the verdict is deemed so excessive as to presuppose that the jury acted from considerations of passion or prejudice,¹⁵ the entire mold is colored by the fact that the case is a proper one for the allowance of punitive damages, and therefore calculated to prejudice and arouse the passions of the jury.

¹² Ohio Const. Art. I, sec. 5. Ohio Gen. Code (Throck. 1934) secs. 10350-10351.

¹³ Ohio Const. Art. I, sec. 10.

¹⁴ *Ibid.* It will be noted, however, that in Ohio, in the event the prisoner does not testify, "his failure to testify may be considered by the court and jury and may be made the subject of comment of counsel."

¹⁵ In which event the court could grant a new trial in Ohio. Ohio Gen. Code (Throck. 1934) sec. 11576, subsec. 4.

CONCLUSION

In this paper, it has not been possible to do more than call attention to the necessity for a reexamination of the doctrine in the light of its historical buttresses, its development, and its modern setting. If it is deemed essential by the courts to find some underlying premise which will logically justify such an award, the theory should be one which will not distort the primary functions of the civil tribunal. True it is, however, that the logical conclusion may not be correct, and may, if not tempered in the fires of ultimate justice, warp the fundamental purpose of the court.

But whether or not from the standpoint of expediency, or in practical effect, it is desirable for the civil court to inflict penalties or otherwise act to supplement the basal objectives of the criminal forum, is a serious question, not to be passed upon lightly.

It is suggested, therefore, that the problem ought to evoke careful study and analysis, in its many ramifications.

County Home Rule in Ohio

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On November 7, 1933 the voters of Ohio approved an amendment to the state constitution which conferred upon counties in the state many of the powers of local self government which cities have enjoyed in this state since September 1912. This amendment was in form a new Article X, the former Article X being wholly repealed. The old article had prevented reform in county government by requiring that all county officers be elected, by limiting terms of office and by requiring that all counties be governed by general state law. The new article contemplates three possible bases for county government: (1) general law, (2) optional law, and (3) home rule charter. Officers may be appointed rather than elected if that is desired and terms of office can be provided by the law or charter without any constitutional limits.